Office - Supreme Court, U.S.
FILED
OCT 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND,
Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This supplemental brief is submitted by respondent Environmental Defense Fund (EDF) pursuant to Rule 22.6 of this Court in order to bring to the attention of the Court a decision which was not available at the time EDF filed its Brief in Opposition to Petition for Writ of Certiorari[1] and which further undermines the position taken by the petitioner EPA in this litigation. In its October 1, 1982, decision in *Village of Kaktovik* v. *Watt*, Nos. 81-1752, -1753 and -1774 (D.C. Cir., filed Oct. 1, 1982), the Court of Appeals for the District of Columbia Circuit reversed an award of attorney fees under the

[1] Hereafter "Brief in Opposition."

Outer Continental Shelf Lands Act (OCSLA)[2] and the Endangered Species Act (ESA)[3], each of which contains a fee award provision worded identically to the Clean Air Act provision involved in this case. (Fifteen copies of the full opinion of the Court have been lodged with the Clerk with the filing of this Supplemental Brief.) The opinion for the Court of Appeals was written by Judge Wilkey, whose dissent in *Alabama Power* v. *Gorsuch*, 672 F.2d 1, 13 (1982), provided the *only* support for EPA's contention in this case that there is a general presumption against fee awards to parties who do not prevail on any claim. See Petition at 14. Although the court denied fees in the *Village of Kaktovik* case, Judge Wilkey took pains to point out that even though plaintiffs "ultimately lost on all issues . . . this need not bar the award of attorneys' fees and costs . . . ." (Slip Op. at 3.) In addition, Judge Wilkey distinguished the present case from *Village of Kaktovik* and, in doing so, he tacitly approved the Court of Appeals decision in this case and supported many of the arguments advanced herein by EDF and the Sierra Club.

Specifically, the court in *Village of Kaktovik:*

(1) pointed out that in this case the fee applicants' litigation was found to be "exceptional" and a "substantial contribution to the statutory goals," (Slip Op. at 4);

(2) emphasized the importance of this case in that it involved "national pollution standards" with "critical implications" for the environment, human health, and the economy (Slip Op. at 9);

(3) noted that this case was "decidedly of first impression" and that the complexity of the issues required the court in this case to issue a 122-page opinion to resolve them (Slip Op. at 10); and

(4) as if in response to the "floodgates of litigation" argument advanced by EPA in this case, pointed out that the award of fees required a "substantial" or even "ex-

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[2] 43 U.S.C. §§ 1331-56, 1801-02, 1811-24, 1841-47, 1861-66 (1976 & Supp. IV 1980).

[3] 16 U.S.C. §§ 1531-42 (1976 & Supp. IV 1980).

ceptional" contribution to the goals of the statute and, accordingly, that fee awards to non-prevailing parties would be limited to exceptional cases (Slip Op. at 12-13).

Since Judge Wilkey's previous opinion provided the only support for a central point in EPA's argument, the *Village of Kaktovik* case clearly underscores the lack of authority underlying EPA's position.

For the reasons previously set forth in EDF's Brief in Opposition and the reasons set forth in the *Village of Kaktovik* case, EDF urges this Court to deny the EPA Petition.

Respectfully submitted,

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October 1982